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Nos. 02-1727 and 02-1733

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

NATIONAL RIGHT TO LIFE COMMITTEE, INC., *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeals from the
United States District Court
for the District of Columbia

INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

ROGER M. WITTEN
WILMER, CUTLER &
PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Additional Counsel Listed On Inside Cover

23 pp

BURT NEUBORNE
FREDERICK A.O. SCHWARZ, JR.
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas,
12th Floor
New York, NY 10013

CHARLES G. CURTIS, JR.
DAVID J. HARTH
MICHELLE M. UMBERGER
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

BRADLEY S. PHILLIPS
MUNGER, TOLLES & OLSON LLP
355 South Grand Ave.
35th Floor
Los Angeles, CA 90071

E. JOSHUA ROSENKRANZ
HELLER EHRMAN WHITE & MCAULIFFE LLP
120 West 45th Street
New York, NY 10036

ALAN B. MORRISON
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009

MICHAEL D. LEFFEL
A. KRISAN PATTERSON
JENNIFER L. MUELLER
STACY E. BECK
JERROD C. PATTERSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

FRED WERTHEIMER
ALEXANDRA EDSALL
DEMOCRACY 21
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006

TREVOR POTTER
GLEN M. SHOR
CAMPAIGN LEGAL CENTER
1101 Connecticut Ave., N.W.
Suite 330
Washington, D.C. 20036

QUESTIONS PRESENTED

1. Whether the Court should summarily dispose of appellants' constitutional challenges to Sections 212, 214(b), 214(c), 304, 319, and 403(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because those challenges are plainly nonjusticiable or insubstantial under settled law.

2. Whether, in other respects, the Court should note probable jurisdiction over appellants' constitutional challenges to BCRA, and set the appeals on those issues for briefing and oral argument.

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INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

INTRODUCTION

Although intervenor-appellees take issue with the positions taken on the merits by the Republican National Committee (RNC), *et al.*, and the National Right to Life Committee (NRLC), *et al.*, in their jurisdictional statements, we agree that many of the questions presented in their jurisdictional statements warrant plenary consideration by this Court.[1] In light of Sections 403(a)(3) and (a)(4) of the Bipar-

[1] Intervenor-appellees are Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin

tisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, which provide for direct and expedited review in this Court of any final decision of a three-judge district court hearing a challenge to the constitutionality of BCRA, and in light of the importance of the issues to the nation, intervenor-appellees submit that the Court should note probable jurisdiction over these appeals and set the cases for briefing and oral argument.

Some of the questions presented in the RNC and NRLC jurisdictional statements, however, do not warrant plenary consideration by this Court. Those questions raise challenges to BCRA that are either clearly nonjusticiable under well-settled principles of constitutional and administrative law, or otherwise so insubstantial as not to justify further briefing and argument. It is entirely appropriate for the Court to summarily dispose of appeals by dismissal or affirmance, insofar as they seek to raise issues that are nonjusticiable or insubstantial.[2] Summary disposition of such issues is especially appropriate in complex cases such as these, which present challenges by 77 separate parties to nearly two dozen separate provisions. *See* Supplemental Appendix to Jurisdictional Statement (JSSA) 10-15sa ("Chart of the Court's Rulings"), 76-77sa n.55 (per curiam). Through summary disposition, the Court can focus briefing and argument on those issues that warrant plenary review. Such summary disposition would promote the orderly and expedited resolution of the various pending challenges to BCRA.

Meehan, Senator Olympia Snowe, and Senator James Jeffords. The intervenors are also appellants in No. 02-1702, *McCain* v. *McConnell*.

[2] *See* S. Ct. R. 18.6 and 18.12; *see also Don't Bankrupt Wash. Comm.* v. *Continental Ill. National Bank & Trust Co.*, 460 U.S. 1077 (1983) (summary dismissal for want of jurisdiction, "it appearing appellant lacks standing to bring this appeal"); *Republican National Comm.* v. *FEC*, 445 U.S. 955 (1980) (summary affirmance of lower court decisions rejecting various constitutional challenges to campaign finance laws on the merits); *Clark* v. *Kimmitt*, 431 U.S. 950 (1977) (summary affirmance of D.C. Circuit's dismissal of various challenges to campaign finance laws as nonjusticiable).

ARGUMENT

I. THE RNC APPELLANTS FAIL TO RAISE ANY JUSTICIABLE QUESTION WITH RESPECT TO THE COORDINATION RULEMAKING PROVISIONS OF BCRA SECTION 214(b)-(c)

Like the McConnell appellants, the RNC appellants challenge the coordination rulemaking provisions of BCRA Section 214(b)-(c). *See* RNC J.S. Question Presented 2 and pp. 15-16. The RNC appellants contend that Section 214 directed the Federal Election Commission (FEC) to promulgate coordination rules that will *necessarily* encompass conduct that is truly independent of a candidate, and will make political parties responsible for independent expenditures by persons or entities with whom the parties have little if any relationship. *See* RNC J.S. 4, 6, 15-16.

For the reasons set forth at pages 7-12 of our response to the McConnell and NRA jurisdictional statements (Nos. 02-1674 and 02-1675, respectively), these challenges to Section 214 fail under well-established principles of justiciability and subject-matter jurisdiction. Appellants have no basis for a facial challenge to Section 214, for there is nothing in that provision that requires the FEC to issue regulations that would conflict with any constitutional principle that this Court has articulated with respect to independent expenditures. To the extent the RNC appellants are dissatisfied with the outcome of the FEC's rulemaking, they may challenge the Commission's coordination rules in an action for judicial review under the Administrative Procedure Act, in which they may raise both constitutional and statutory challenges to those rules. The district court was therefore clearly correct in holding these claims to be nonjusticiable and beyond the subject-matter jurisdiction of the special three-judge district court conferred by BCRA Section 403(a). *See* JSSA 134-56sa (per curiam).

II. THE RNC APPELLANTS LACK STANDING TO CHALLENGE THE "MILLIONAIRES PROVISIONS" OF BCRA SECTIONS 304 AND 319

The third question presented in the RNC's jurisdictional statement is whether BCRA's so-called "Millionaires Provisions" violate constitutional equal protection principles. The challenged provisions in BCRA Sections 304 and 319 allow a Senate or House candidate, respectively, to raise hard money in increased amounts if his or her opponent spends large sums of personal money on the campaign. The contribution limits increase depending on the amount of personal funds expended by the self-financed opponent. The statutory formula takes into account funds amassed by candidates (not including contributions from personal funds), so that an incumbent candidate with a sizable war chest will not benefit unless his or her self-financed opponent devotes a much larger amount of personal funds to the campaign. *See* BCRA § 316. A candidate whose opponent spends a "personal funds amount" more than a certain sum may also accept increased coordinated expenditures from his or her state or national party. *See* BCRA § 304(a) (Senate), § 319(a) (House). A candidate's ability to accept contributions and party coordinated expenditures under these increased limits is subject to an overall cap tied to the amount spent by the self-financed opponent. *Id.*

The RNC appellants contend that these provisions "effectively punish any Senate or House candidate who uses more than specified amounts of personal assets to fund his or her campaign," thereby violating such candidates' "First Amendment-protected rights to spend their own resources." RNC J.S. 4, 6. The district court unanimously and correctly held, however, that none of the RNC appellants has standing to challenge those provisions in this litigation. *See* JSSA 8sa (per curiam), 475-77sa (Henderson). As Judge Henderson explained, none of the RNC appellants claims to be a candidate or even a potential candidate for the House or Senate who might spend more than the specified amounts of personal funds on a campaign. *See* JSSA 477sa. Accordingly, a

claim that any of the RNC appellants would suffer disadvantage because of the challenged provisions is entirely theoretical at this point.

The RNC appellants also argue that political parties have standing to challenge Sections 304 and 319 on equal protection grounds because those provisions supposedly require parties to treat their own similarly situated candidates differently, with respect to making coordinated expenditures. *See* RNC J.S. Question Presented 3 and pp. 16-17. As Judge Henderson explained, that reading of BCRA is plainly wrong: "even in circumstances where the provisions *permit* a party committee to engage in unlimited coordinated spending [subject to the overall cap], they do not *require* a committee to do so." JSSA 477sa.

Moreover, whether the party coordinated-expenditure limits are altered in any given instance will depend on a large number of highly conjectural variables: the party's candidate must face a wealthy opponent; the opponent must decide to spend a "personal funds amount" over a certain sum; the relative campaign funds available to the respective candidates must exceed a certain ratio; and a candidate who otherwise qualifies to benefit from increased party coordinated expenditures must request them. This string of variables confirms that the RNC appellants fail to meet the Article III requirement of injury that is "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (internal quotation marks and citation omitted); *see also Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 601 (1992).

III. The NRLC Appellants Fail To Raise Any Justiciable Or Substantial Question With Respect To BCRA Section 212

Like the McConnell appellants, the NRLC appellants seek to challenge what they maintain is a requirement in BCRA Section 212 that "advance notice" be given of independent expenditures. *See* NRLC J.S. Question Presented 5 and p. 22. As we have explained in our response to the McConnell and NRA jurisdictional statements, at pp. 3-5,

the FEC has unambiguously construed Section 212 *not* to require any such advance notice. Accordingly, as the district court concluded (*see* JSSA 130-34sa (per curiam)), there is no credible threat that Section 212 will be enforced against anyone in the manner that the NRLC appellants fear, and so any challenge to Section 212 on the ground that it unconstitutionally requires "advance notice" is clearly nonjusticiable and without merit.

IV. THE NRLC APPELLANTS FAIL TO RAISE ANY SUBSTANTIAL QUESTION WITH RESPECT TO THE GEOGRAPHIC SCOPE OF THE DISTRICT COURT'S INJUNCTIVE RELIEF

The NRLC appellants ask this Court to decide "[w]hether [the] District Court injunction should extend to activities outside the District of Columbia." NRLC J.S. Question Presented 6; *see also id.* at 22-24. That question presents no issue appropriate for this Court's consideration. The district court stayed its injunction on May 19, pending this Court's final disposition of the appeals from the district court's final judgment. On May 23, the Chief Justice denied the NRLC appellants' application to vacate the district court's stay. Thus, there is *no* injunction presently in effect, let alone one that is only being honored within the District of Columbia. This Court's final disposition of the appeals, of course, will have nationwide force. The question presented is thus plainly insubstantial.

V. THE NRLC APPELLANTS FAIL TO RAISE ANY SUBSTANTIAL QUESTION WITH RESPECT TO THE CONGRESSIONAL INTERVENORS' STANDING UNDER BCRA SECTION 403(b)

Finally, the NRLC appellants ask this Court to decide whether BCRA Section 403(b), which permits Members of Congress to intervene in any action brought to challenge the constitutionality of BCRA, violates Article III standing principles. *See* NLRC J.S. Question Presented 7 and pp. 24-

27.[3] The NRLC argues that a party who seeks to intervene as a defendant must establish Article III standing, and contends that the courts of appeals have reached conflicting conclusions on that point. That question, however, is not presented by this case, because the district court assumed that a party seeking to intervene as a defendant must establish Article III standing, and then unanimously concluded that the intervenors in this case had done so. *See* App., *infra*, 4a-6a.

In challenging the intervenors' standing, the NRLC errs in analogizing this case to *Raines* v. *Byrd*, 521 U.S. 811, 829 (1997), and similar cases involving the standing of legislators who sought to vindicate various institutional interests. *See* NRLC J.S. 26. As the district court correctly explained, the intervenors in this case "do not seek to vindicate a 'sponsorship' interest in the Act." App., *infra*, 7a. Rather, the intervenors have Article III standing as direct *individual* participants in the electoral process, with respect to the laws governing the processes by which they seek and retain their offices. Thus, "as opposed to members of the general public, [intervenors] have a concrete, direct, and personal stake—as candidates and potential candidates—in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office." *Id.* at 6a.[4]

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[3] The NRLC appellants acknowledge that Section 403(b), by providing for intervention of right by Members of Congress, removes any prudential standing concerns that might otherwise exist. *See* NRLC J.S. 25; *see also Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997).

[4] *See also Buckley* v. *Valeo*, 424 U.S. 1, 7-8, 12 n.11 (1976) (per curiam); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 383 (2000); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993) ("[A]n impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing."); *Meek* v. *Metropolitan Dade County*, 985 F.2d 1471 (11th Cir. 1993) (standing to intervene in defense of election law); *Marshall* v. *Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) (candidate standing to defend election law); *cf. Cook* v. *Gralike*, 531 U.S. 510, 531 (2001) (Rehnquist, C.J., concurring in the judgment) ("no one questions the standing" of candidates with respect to ballot-access provisions).

Moreover, it is far from clear how the NRLC appellants could benefit from their challenge to the intervenors' standing in this Court. Even if the NRLC appellants persuaded this Court that the intervenors lacked standing, that would not provide a basis for reversal or vacatur of any aspect of the district court's decision that was adverse to them, for they would still have to prevail on the merits against the Executive Branch defendants. The situation in this case is therefore closely analogous to that in *Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976) (per curiam), in which this Court decided not to linger over questions of individual party standing given that "at least some" parties had standing with respect to each challenged statutory provision.

CONCLUSION

The Court should summarily dispose of the RNC and NRLC appellants' challenges to Sections 212, 214(b), 214(c), 304, 319, and 403(b). In all other respects, the Court should note probable jurisdiction of the appeals in these cases and set the cases for plenary review.

It is, moreover, highly ironic that the NRLC appellants would challenge the standing of the intervenor-appellees, given that two of the objecting appellants, Representative Mike Pence and Alabama Attorney General Bill Pryor, base their own standing on precisely the same kinds of interests in the electoral process. *See* McConnell, *et al.*, Second Amended Complaint ¶¶ 17, 18.

Respectfully submitted,

ROGER M. WITTEN
WILMER, CUTLER &
PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
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(202) 663-6000

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